SUPREME COURT, U. S.
JUN 24 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73 1931

NATIONAL DYNAMICS CORPORATION, a corporation, and ELLIOTT MEYER, individually and as an officer of said corporation,

Petitioners,

against

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners,

against

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on March 28, 1974, which affirmed paragraphs 4 and 6 of an Order of the Federal Trade Commission (the "Commission"), dated February 16, 1973, commanding petitioners to cease and desist from certain alleged deceptive practices found by the Commission to violate Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1) (the "Act").

Citations to Opinions Below

The opinion of the Court of Appeals for the Second Circuit is printed in Appendix A *infra*, and is not yet officially reported.

The opinion of the Federal Trade Commission and the opinion of the Federal Trade Commission's Administrative Law Judge Donald R. Moore are officially reported at 82 FTC 488.*

Jurisdiction

The judgment of the Court of Appeals was entered on March 28, 1974. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Can the Federal Trade Commission prohibit express representations of the laboratory testing of petitioners' product, unless such tests meet a standard, which, because of the vagueness of such standard, is impossible of compliance without substantial risk and further litigation, and where such provision has no basis in the record and bears no relation to any violation of law found to exist in this case?

2. Can the Federal Trade Commission impose upon petitioners the financially burdensome duty of obtaining a written receipt of its cease and desist order from numerous independent distributors of its product, scattered all over the country, with whom petitioner has no contact,

* These opinions are contained in the Petitioners' Appendix in the United States Court of Appeals for the Second Circuit and is submitted herewith. References thereto are indicated as p. —a.

other than through the mail and who are not, legally and factually, subject to petitioners' control?

Statutes Involved

The statutory provision involved is Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1), and the Fifth Amendment to the Constitution of the United States. The statute and constitutional amendment are printed in Appendix B *infra*.

Statement

This is a petition for Writ of Certiorari to review an Order and judgment of the United States Court of Appeals for the Second Circuit, entered on March 28, 1974, which remanded in part and affirmed in part a six-paragraph Order of the Federal Trade Commission commanding petitioners to cease and desist from certain alleged deceptive practices allegedly found by the Commission in this case to violate 15 U.S.C. 45(a)(1). It is paragraphs 4 and 6 of said Order which petitioners wish this Court to review as in violation of its constitutional right under the Fifth Amendment to the Constitution of the United States, and beyond the scope of Section 5 of the Act.

Facts

Petitioner National Dynamics Corporation is a corporation organized and existing under the laws of the State of Florida, with its office and principal place of business at 145 East 32 Street in the City, County and State of New York. The Corporation markets, exclusively through mail order, a battery additive called "VX-6". It was

stipulated between counsel that in 1969, respondents sold VX-6 to 12,000 individuals who bought for resale, and 6,000 individuals who purchased as consumers (Transcript (T.R.) 173).

Petitioner Elliott Meyer is an individual and an officer, and director of the corporate petitioner, and he formulates, directs and controls the acts and practices thereof. (Throughout most of this brief, the petitioners will be referred to collectively as "petitioners.")

On November 1, 1969, the Commission issued a Complaint and proposed Order alleging that petitioners were engaged in unfair methods of competition and deceptive acts and practices in violation of Section 5 of the Act (15 U.S.C. 45(a)(1)).

In this case, for the first time, the Commission sought to prohibit, among other things, "performance" or "use" claims for a product on the ground that such claims were *unsubstantiated,* without alleging or proving such claims were false.

The Commission has, since the filing of the Complaint in the instant case, commenced at least two other actions upon the same novel theory. As in the instant case, in the *Pfizer* case (FTC Docket No. 8819), the Commission itself rejected the theory, under the circumstances existing in that case, and held, as it has in the instant case, that if an advertiser has a "resonable basis" to support his product's performance claims, that is sufficient to allow such performance claims to continue to be advertised, and that substantiation by "scientific testing" is not necessarily a prerequisite for the making of such claims.

In the *Firestone* case, however, (*Firestone Tire and Rubber Co., Inc.* v. *FTC*, 481 F. 2d 286 C.A. 6, 1973 cert

den. 94 S. Ct. 841 (1973)), the Sixth Circuit affirmed a provision in a Commission Order prohibiting such claims as "25% quicker stopping action" for Firestone tires, regardless of the truth or falsity thereof, unless such claims have been

> "fully and completely substantiated by *competent scientific tests*, with the results of the test, the original test data collected in the course of the test, and a detailed description of how the test was performed available in written form for inspection for at least three years following the final use of the representation." (emphasis added).

So far as is material to the instant petition, the Commission complaint alleged, among other things, that petitioners, through the publication of the advertising represenations set forth at pages 2, 3 and 4 of the complaint, falsely represented to the public:

a) that laboratories have "completely" and "fully" tested VX-6 as to performance, whereas in truth and in fact, laboratories have not fully or completely tested the product; and

b) that "use" or "performance" claims for VX-6, such as those set out in the complaint, raise the implication that such claims have been substantiated through "competent scientific tests" whereas in truth and in fact, use and performance claims have not been substantiated by competent scientific tests.

The Commission introduced the testimony of two "scientific" experts to prove that petitioners' extensive and numerous laboratory tests introduced into evidence were not "competent scientific tests," and did not substantiate petitioners' performance claims. The testimony of Dr.

White, the second expert, was stipulated, and to the extent material, was as follows:

"2. That even assuming all of the above laboratory tests are competent scientific tests, and that their conclusions are correct the following performance claims, with respect to the duration aspects of the claims for VX-6 listed below, would not be substantiated by these tests:

1. Ends battery troubles *forever.*
2. Assures like-new operations of batteries *for the life of the car.*
3. Makes new batteries trouble-free *for 5 years or more.*
4. Gives *years and years* of dependable battery service.
5. Reserve power is *endless.*
6. Makes a battery last a *lifetime.*
7. Every man you sell will have a *lifetime battery.*
8. VX-6 prevents sulfation from forming *for the life of the car* (emphasis in original).

Provided, however, that this paragraph of the stipulation is subject to the following objections by respondents:

1. Expert testimony is not needed to determine whether these performance claims are substantiated by the tests.

2. The claims listed above are not typical and illustrative of the performance claims referred to in the complaint.

3. The performance claims listed above are taken out of context."

The issue at the trial was whether such claims should be prohibited as unsubstantiated.

The Administrative Law Judge found that the "duration claims" had not been substantiated by laboratory tests and Commission counsel argued that, therefore, the laboratories had not "fully" tested the product, so that duration claims and "laboratory testing" claims should be prohibited. The Administrative Law Judge held against the Commission, however, and did not include a provision in the order prohibiting the express claims of laboratory testing for four reasons:

1. There was no published standard for a "fully" tested product and, therefore, he could make no finding that the express claims for laboratory testing of VX-6 had violated such a standard (pp. 60a-61a).

2. There was no evidence that petitioners had represented the duration claims to be laboratory tested (p. 87a).

3. In view of the technical nature of the claims set forth in the complaint, as examples of those giving rise to the implied claim of testing, it was doubtful whether the issue of duration claims, (not listed in the complaint) was properly in this case at all (p. 88a).

4. The product had been laboratory tested and the test results tended to support the claims made (pp. 59a, 83a, 87a, Commission agreed at 111a).

In addition, the Administrative Law Judge made a specific finding that the FTC had *failed to prove* that none of petitioners' laboratory tests introduced in this

case were not "competent scientific tests" (p. 89a), and the Commission agreed (109a)!

The duration claims themselves although not substantiated, were not prohibited because the Administrative Law Judge rejected the entire concept of prohibiting claims not proven false simply because a respondent could not substantiate them.

On Appeal by counsel to the Commission, the Commission, however, seized upon the finding that petitioners' "duration claims" were unsubstantiated by laboratory tests, and made a "finding" of its own, that at least one of the "duration claims" was represented to be substantiated by laboratory tests (p. 116a).

Since it found that the duration claims were not substantiated by the laboratory tests, the Commission argued that the representation of laboratory testing of such duration claims was false, and the product had, therefore, in the opinion of the Commission, not been "fully" tested by laboratories. Thus, a violation of Section 5 of the Act was found and, Paragraph 4 of the Order, imposed, which is the subject of this appeal. Paragraph 4 prohibits petitioners from:

> "Representing, directly or by implication, in any advertisement that an independent laboratory has tested any product or that any laboratory test substantiates or supports performance claims in said advertisement, unless each performance claim in said advertisment has been substantiated by a *competent scientific test* conducted by said laboratory or laboratories and unless such laboratory or laboratories have supplied respondents with a written report which describes, in detail, the entire test performed, including, but not limited, the product

> tested, instruments used, test procedures, data, and results of such test" (see *Firestone* provision, *supra*).

However, this finding and order apparently contradicts its acknowledgment that given the validity of the tests, VX-6 would prolong battery life (114a).

The Second Circuit Court of Appeals also affirmed Paragraph 6 of the Commission's Order, which prohibits petitioners from:

> "Failing to deliver a copy of this order to cease and desist to all present salesmen or other persons engaged in the sale of respondents' products, and failing to secure from each such salesman or other person a signed statement acknowledging receipt of such order."

Reasons for Granting Writ

I—Paragraph 4

a.—*Vagueness of Standard to be Met.*

The issues raised with regard to Paragraph 4 of the Order are matters of continuing recurrence. Numerous, if not a majority, of consumer products sold in the United States are advertised with reference to "performance" claims. In many such products (such as the instant case) the advertiser expressly claims to have "proved" such performance claims with "tests." In other cases, (*Firestone, Pfizer* and the instant case), the Commission may imply a claim of "scientific" testing from the very nature of the claim itself. In all such cases, the Commission has construed the "testing" representation, whether express or implied, to mean "competent scientific test."

The imposition of a requirement of "adequate" or "competent scientific tests" without an objective refer-

ence standard, is unfair to advertisers who, in most cases, have their product tested by outside independent commercial laboratories, who, themselves, determine the nature of the test, its protocols, competence and "adequacy." Thus, meeting the standard is a matter over which petitioners, and other advertisers, would have no control. They could be caught in the trap of having the principals of the testing companies uphold the "adequacy" of the tests, whicle the Commission attacks the tests as inadequate. The result could be the imposition of substantial civil penalties upon an advertiser as a result of having relied in good faith upon an independent commercial testing laboratory (p. 110a).

An "adequate scientific test," can mean anything to any particular witness. The conflict of testimony on this point in the instant case, and in the *Firestone* case, illustrates the potential litigation which will arise if orders such as Paragraph 4 are promulgated or litigated on an *ad hoc* basis, without an objective standard of "scientific testing."

Petitioners, since the Commission failed to prove that none of its laboratory tests were not competent scientific tests, will continue to refer to their laboratory tests for those performance claims specifically covered by such tests. However, litigation in the form of a penalty proceeding is almost certain, because of the vagueness and broad scope of Paragraph 4 of the Order.

The attention of the Court is respectfully directed to Section 505(d) of the Food, Drug and Cosmetic Act, 21 U.S.C. 355(d) and the regulations promulgated thereunder (21 C.F.R. Section 130.12(a)(5)(ii), setting out in detail on an industrywide basis, the standard by which "adequate and well-controlled investigations, including clinical investigations," will be measured under 505(d). However, notwithstanding the statute and regulations, in *Weinberger* v. *Hynson Westcott & Dunning, Inc.*, 93 S. Ct. 2469, at

2487, 412 U.S. 609 (1973), Justice Powell, in a concurring opinion, noted that he had reservations as to the ability of the Food & Drug Administration to administer such a standard consistent with the Constitutional right of due process. How much stronger the argument in the instant case where the product does not involve the health and safety of any individual and there is no regulation whatsoever for a "competent scientific test." Where is petitioner to go to seek a standard for a "competent scientific test" other then to the tests which it introduced in this case. In *FTC* v. *Henry Broch & Co.*, 368 U.S. 360, 82 S. Ct. 431, 7 L. Ed. 2d 353 (1962), this Court held that reference to an outside undefined standard to be met by a respondent under pain of penalty was sufficient to invalidate a Commission Order.

If the Commission feels it is desirable to impose a standard of laboratory testing upon independent commercial testing laboratories, for the substantiation of "testing" claims, or performance claims, for consumer products, it should do so by the promulgation of trade rules which will apply to the laboratories themselves, not these petitioners alone. To attempt such a standard, as it has in this case, on an *ad hoc* basis is futile, and unfair to petitioners.

b.—*No Basis in the Record.*

The Commission found that the laboratories used by petitioners were bona fide and independent and the Administrative Law Judge found that the reports rendered to the petitioners were in the standard form for commercial laboratories.

Given the findings of the Administrative Law Judge and Commission set forth at pages 7-8-9, *supra* the imposition of paragraph 4, is unrelated to any violation of law committed by petitioners and, is therefore, improperly imposed.

This Court should review and reverse the decision of the Court of Appeals for the Second Circuit with regard to Paragraph 4 of the Order for the reasons.

1. the standard itself is so vague that it is impossible of compliance, and

2. there has been no violation of law to sustain such a provision.

II—Paragraph 6 of the Order is unduly burdensome. It fails to take account of petitioners' lack of contact and control over the twelve thousand independent customers who purchased from it for resale.

The record shows that in 1969, 12,000 individuals purchased from petitioner for resale. These are petitioners' so-called distributors.

Petitioners' contact with them is almost exclusively by mail.

The record also shows that petitioners create and distribute (to all individuals who purchase from it for resale) all advertising material and sales aids used for the sale and resale of VX-6. Some of these sales aids are passed on by petitioners' distributors to other business entities which purchase for resale from distributors, such as gasoline stations. Petitioners have no records regarding to whom its distributors sell VX-6 for resale.

Paragraph 6 of the order is a standard provision found in most Commission Orders and applies very well to the traditional business organization set-up where salesmen or distributors are hourly, daily or weekly in contact with corporate headquarters and there is a continuous physical presence of the corporation in the salesmen's day-to-day activity. In those businesses, the salesmen are steadily employed on a full-time basis, are limited in number, and

indeed in many instances, they cannot be distinguished from any other employee. The purpose of service of the order in those cases is to prevent the salesman from repeating the prohibited misrepresentations. However, in petitioners' situation, it is the distributors themselves who will be protected from future misrepresentations (as to earnings claims) and they, in the future, will be getting literature which complies with the order. It would be redundant to serve them with the order when the literature will speak for itself. The distributors are not likely to repeat any prohibited claims to consumers, since the corrected sales literature upon which their sales are made to consumers will comply with the final order.

In petitioners' situation, paragraph 6 the Order loses its rationale, and becomes oppressive and confiscatory.

In view of the fact that petitioner creates and distributes all advertising material and the fact that on the effective date of the order petitioners will be forced, under threat of penalty, to alter their advertising in conformance with such Order, the benefit to the public in forcing petitioner to serve a copy of the order on each of its "distributors," is insufficient compared to the magnitude of harm to petitioners in terms of the expense and inconvenience involved in service of the order and obtaining a written statement.

It should also be borne in mind that petitioners' distributors are its customers. Service of an FTC order by petitioners upon its customers could seriously jeopardize petitioners' business. This is "punishment," not remedial and this risk is unnecessary to protect the public.

The Order should properly require service only upon petitioners' officers and managers and all employees engaged in the solicitation of orders or having contact with petitioners' distributors, either by mail or telephone.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted and paragraphs 4 and 6 of the Commission Order dated February 16, 1973, should be set aside.

Respectfully submitted,

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by .....
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Dated: June 12, 1974

Appendix A, Opinion of United States Court of Appeals For the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 355—September Term, 1973.

(Argued January 16, 1974 Decided March 6, 1974.)

Docket No. 73-1754

NATIONAL DYNAMICS CORPORATION, a corporation, and ELLIOTT MEYER, individually and as an officer of said corporation,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

Before:

MOORE, FRIENDLY AND ANDERSON,

Circuit Judges.

Petition to review an order of the Federal Trade Commission requiring petitioner to cease and desist from deceptive advertising. Petition denied in part; cause remanded in part.

JEROLD W. DORFMAN, Esq., New York, N. Y. (Friend & Dorfman, New York, N. Y., of Counsel), *for Petitioners.*

Appendix A

JOHN T. FISCHBACH, Esq., Federal Trade Commission, Washington, D. C. (Calvin J. Collier, General Counsel, and Harold D. Rhynedance, Jr., Assistant General Counsel, Federal Trade Commission, Washington, D. C., of Counsel), *for Respondent.*

PER CURIAM:

National Dynamics Corporation (NDC) manufactures a battery additive known as VX-6. It markets the product largely through some 12,000 distributors. Some of these work on a full-time basis, but most work only part-time. The distributors are not NDC employees, but the company supplies them with sales and advertising materials with which to promote the product.

In November, 1969, the Federal Trade Commission issued a complaint against NDC's advertising practices. Broadly speaking, the charges were of two sorts: Some related to allegedly misleading claims concerning potential earnings of VX-6 distributors; others concerned the performance claims NDC made for its product. Following the leisurely course typical of FTC proceedings, this one led to a six paragraph cease and desist order issued February 16, 1973, and ended in an order denying reconsideration dated May 1, 1973.

Only four of the six ordering paragraphs are challenged. Two of these, paragraphs 1 and 2, relate to the overly enthusiastic depiction of the rewards awaiting prospective distributors; one, paragraph 4, relates to representations concerning the performance of VX-6; the remaining one,

paragraph 6, directs NDC to deliver a copy of the order to all present salesmen or other persons engaged in the sale of its products and to secure a signed statement acknowledging receipt.

Paragraph 1 requires NDC to cease and desist from

> Representing, directly or by implication, that persons purchasing respondents' products can or will derive any stated amount of sales, profits or earnings; or representing, directly or by implication, the past or present sales, profits or earnings of purchasers of respondents' products unless in fact the past sales, or the profits and earnings represented, are those of a substantial number of purchasers and accurately reflect the average sales, profits or earnings of such purchasers under circumstances similar to those of the purchaser or prospective purchaser to whom the representation is made; or misrepresenting, in any manner, the past, present or future sales, profits or earnings from the resale of respondents' products.

In the course of its attack on this paragraph, NDC says it cannot feasibly comply with the phrase "under circumstances similar to those of the purchaser or prospective purchaser to whom the representation is made" since it does not know what the circumstances of any particular purchaser may be. Apparently the Commission was endeavoring to requiring NDC to disclose whether the distributors whose earnings they cited worked part-time or full-time, but the language is not well adapted to carrying out this sound purpose. We likewise do not see why NDC should be limited to advertising only the average sales or earnings of its distributors rather than be permitted to

state ranges for various types of distributors, provided it does not make deceptive use of unusual earnings realized only by a few. We shall not undertake to redraft the paragraph; with some good will on both sides, these problems should be readily susceptible of resolution.[1]

Changes in paragraph 1 will require conforming changes in paragraph 2 which requires NDC to maintain records substantiating the accuracy of its representations. Beyond that, while the Commission can permissibly require NDC to keep records of the sales of distributors in various basic categories, such as part-time and full-time workers, the requirement that the records reflect the sales, profits or earnings of distributors "under circumstances similar to" purchasers or prospective purchasers is too vague. NDC also objects to the recordkeeping requirement because it claims that it cannot feasibly obtain the profit and earnings figures of its thousands of distributors. Commission counsel answers that NDC must have records showing the sales to each distributor and information concerning the permitted markup, and that this would suffice if the representations were similarly limited. We think this paragraph should be clarified as indicated. On the other hand, NDC's argument that it was denied due process because the recordkeeping provision was not sought in the complaint, although it was proposed in complaint counsel's appeal brief to the Commission and answered by NDC, is without merit, *FTC* v. *National Lead Co.*, 352 U.S. 419, 427-28 (1957), as NDC's broader attacks even more plainly are.

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[1] NDC has called our attention to the action of the FTC in approving an affidavit of compliance on a similar issue in *Matter of Merlite Industries, Inc.*, File No. 6523049, dated March 1, 1967. Without in any way limiting the FTC to that formulation, we think it may afford a useful basis from which to start a redraft.

Appendix A

Paragraph 4 of the order directs NDC to cease and desist from

> Representing, directly or by implication, in any advertisement that an independent laboratory has tested any product or that any laboratory test substantiates or supports performance claims in said advertisement, unless each performance claim in said advertisement has been substantiated by a competent scientific test conducted by said laboratory or laboratories and unless such laboratory or laboratories have supplied respondents with a written report which describes, in detail, the entire test performed, including, but not limited [to], the product tested, instruments used, test procedures, data and results of such test.

NDC says this is inconsistent with the findings by the Administrative Law Judge and the Commission that the test reports in the company's possession adequately substantiated its claims concerning the effectiveness of VX-6. However, both the Administrative Law Judge and the Commission found that NDC's performance claims relating to the durational capacities of VX-6 were clearly unsubstantiated. The Commission further found that petitioners had expressly or impliedly represented VX-6 as laboratory-tested, without qualification, and that those representations had conveyed the misleading impression that the duration-of-effect claims were based on laboratory tests. Although petitioners contend that paragraph 4 should, at most, prohibit only unsubstantiated durational claims, the paragraph as written appears reasonably related to the misrepresentations found by the Commission. Accordingly, we

find no flaw in paragraph 4, *FTC* v. *Colgate Palmolive Co.*, 380 U.S. 374, 389-90 (1965).[2]

We likewise see no merit in NDC's objections to paragraph 6, described above. NDC's point is that since it supplies the distributors with all the advertising materials, there is no need to send a copy of the order and obtain a receipt. But distributors may have a supply of old materials and may not confine themselves to the written word. Since the copies of the order can be delivered along with the revised advertising material, the only burden on NDC is of using certified mail so as to obtain a receipt. To impose this requirement is well within the broad power confided to the FTC in framing remedial orders.

The petition to review is denied except with respect to Paragraphs 1 and 2 of the order which are remanded to the Commission for reformulation in accordance with this opinion. No costs.

[2] Petitioners contend that the initial complaint and proposed order did not adequately identify the issues to be litigated. However, the complaint sufficiently alleged that the performance claims had not been substantiated through adequate testing and that the product had not been "fully tested," and paragraph 4 of the final order is a narrower version of the two portions of the proposed order dealing with representations of testing.

Appendix B, Statutes Involved

CONSTITUTION OF THE UNITED STATES—AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FEDERAL TRADE COMMISSION ACT —15 U.S.C. 45

§45. Unfair methods of competition unlawful; prevention by Commission—Declaration of unlawfulness; power to prohibit unfair practices

(a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

(2) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as

applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

(3) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby.

(4) Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any right or right of action as described in paragraph (3) of this subsection shall constitute an unlawful burden or restraint upon, or interference with, commerce.

(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.

(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in section 406(b) of said Act, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

Proceeding by Commission; modifying and setting aside orders

(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in

the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by sections 41 to 46 and 47 to 58 of this title, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however*, That the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

Review of order; rehearing

(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission, and thereupon the Commission shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to

adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 347 of Title 28.

Jurisdiction of court

(d) Upon the filing of the record with it the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

Precedence of proceedings; exemption from liability

(e) Such proceedings in the court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the Commission or judgment of court to enforce the same shall in anywise relieve or absolve any person, partnership, or corporation from any liability under the Antitrust Acts.

Service of complaints, orders and other processes; return

(f) Complaints, orders, and other processes of the Commission under this section may be served by anyone duly

authorized by the Commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the residence or the principal office or place of business of such person, partnership, or corporation; or (c) by mailing a copy thereof by registered mail or by certified mail addressed to such person, partnership, or corporation at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process mailed by registered mail or by certified mail as aforesaid shall be proof of the service of the same.

Finality of order

(g) An order of the Commission to cease and desist shall become final——

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b); or

(2) Upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed, or the petition for review dismissed by the court of appeals, and no petition for certiorari has been duly filed; or

(3) Upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or

the petition for review dismissed by the court of appeals; or

(4) Upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Commission be affirmed or the petition for review dismissed.

Same; order modified or set aside by Supreme Court

(h) If the Supreme Court directs that the order of the Commission be modified or set aside, the order of the Commission rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the Commission shall become final when so corrected.

Same; order modified or set aside by Court of Appeals

(i) If the order of the Commission is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the

order of the Commission shall become final when so corrected.

Same; rehearing upon order or remand

(j) If the Supreme Court orders a rehearing; or if the case is remanded by the court of appeals to the Commission for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered upon such rehearing shall become final in the same manner as though no prior order of the Commission had been rendered.

Definition of mandate

(k) As used in this section the term "mandate", in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.

Penalty for violation of order; injunctions and other appropriate equitable relief

(l) Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure to obey

or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission.

Court appearances of Commission in its own name by its attorneys; notice and consultation with Attorney General

(m) Whenever in any civil proceeding involving this chapter the Commission is authorized or required to appear in a court of the United States, or to be represented therein by the Attorney General of the United States, the Commission may elect to appear in its own name by any of its attorneys designated by it for such purpose, after formally notifying and consulting with and giving the Attorney General 10 days to take the action proposed by the Commission.

As amended Nov. 16, 1973, Pub. L. 93-153, Title IV, §408(c), (d), 87 Stat. 591, 592.

In the Supreme Court of the United States

OCTOBER TERM, 1974

NO. 73-1931

NATIONAL DYNAMICS CORPORATION, ET AL.,
PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 492 F. 2d 1333. The order and opinion of the Federal Trade Commission (C.A. App. 94a-124a[1]) are reported at 82 F.T.C. 488, 545

JURISDICTION

In a decision dated March 6, 1974 (Pet. App. A), the court of appeals held (Pet. App. A6):

> The petition to review is denied except with respect to Paragraphs 1 and 2 of the order which are remanded to the Commission for reformulation in accordance with this opinion. No costs.

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[1]"C.A. App." refers to petitioners' appendix in the court of appeals.

On the same day the court notified counsel by letter (Appendix; *infra*) that:

> The Court has today handed down a decision in the above entitled case denying petition in part, and remanding cause in part.
>
> * * * * *
>
> Judgment has been entered today and a mandate will issue in accordance with Rule 41 of the Federal Rules of Appellate Procedure.
>
> * * * * *

No separate judgment was entered. On motion of the Federal Trade Commission for a more specific judgment enforcing all the paragraphs not remanded, *i.e.*, paragraphs 3-6 (only paragraphs 1, 2, 4, and 6 had been specifically mentioned in the opinion), the court entered a judgment dated March 28, 1974, affirming and enforcing paragraphs 3-6 of the Commission's order (Pet. App. C). The petition for a writ of certiorari was filed on June 24, 1974. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

The timeliness of the petition is discussed *infra*, p. 5.

QUESTIONS PRESENTED

1. Whether the petition for a writ of certiorari is untimely.

2. Whether the Federal Trade Commission, upon finding that petitioners had violated Section 5 of the Federal Trade Commission Act by making misleading representations that advertised product claims were supported by laboratory tests, acted within its discretion in ordering petitioners, *inter alia*, (1) to cease and desist from representing that claims are supported by independent labora-

tory tests unless the claim has in fact been substantiated by a "competent scientific test," and (2) to deliver a copy of the cease-and-desist order to all persons selling petitioners' product.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. 45, is set forth in pertinent part in Pet. App. B.

STATEMENT

Petitioners market a battery additive, VX-6. The Federal Trade Commission determined that petitioners' advertising of VX-6 was misleading and deceptive, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45 (C.A. App. 99a-124a). The Commission found that the advertisements contained numerous claims concerning the short term and long term beneficial effects of VX-6[2] and represented that VX-6 had been tested by independent laboratories; but that the laboratory tests did not support the claims relating to long term effects (C.A. App. 117a). The Commission found the advertisements misleading because (C.A. App. 116a; footnote omitted):

> [A]dvertisements which expressly or impliedly represent the product as laboratory tested, without qualification, and then proceed to describe the performance characteristics of the product, have a tendency and capacity to lead the public to believe that the laboratories have fully tested the product

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[2]The respresentations as to long term benefits include: (1) Ends battery trouble forever. (2) Assures like-new operation of batteries for the life of the car. (3) Makes new batteries trouble free for five years or more. (4) Reserve power is endless (C.A. App. 112a).

for each of the performance attributes claimed in the advertisement.

The Commission ordered petitioners, *inter alia,* to cease and desist from (C.A. App. 95a-96a):

> 4. Representing, directly or by implication, in any advertisement that an independent laboratory has tested any product or that any laboratory test substantiates or supports performance claims in said advertisement, unless each performance claim in said advertisement has been substantiated by a competent scientific test conducted by said laboratory or laboratories and unless such laboratory or laboratories have supplied respondents with a written report which describes, in detail, the entire test performed, including, but not limited, the product tested, instruments used, test procedures, data, and results of such test.
>
> * * * * *
>
> 6. Failing to deliver a copy of this order to cease and desist to all present salesmen or other persons engaged in the sale of respondents' products, and failing to secure from each such salesman or other person a signed statement acknowledging receipt of such test.

In adopting paragraph 6 the Commission noted (C.A. App. 124a):

> In our judgment, it is necessary to inform these distributors of the Commission's order to provide adequate protection against the continuation of the deception made possible through [petitioners'] dissemination of deceptive advertising literature.

In a *per curiam* opinion, the Court of Appeals for the Second Circuit denied the petition to review except as to paragraphs 1 and 2; it upheld paragraphs 4 and 6, the paragraphs at issue here (Pet. App. A1-A6; Pet. 9, 12).

ARGUMENT

1. On March 6, 1974, the court of appeals rendered its opinion, the concluding paragraph of which "denied" the petition for review "except with respect to Paragraphs 1 and 2" of the Commission's order. On the same day, the court notified counsel that "[j]udgment has been entered today." The time for filing a petition for a writ of certiorari was not extended, and, accordingly, the 90-day period provided by 28 U.S.C. 2101(c) for petitioning in civil cases expired on June 4, 1974. The petition was filed on June 24, 1974, and was thus out of time unless the time for petitioning ran from the judgment entered on March 28, 1974.

That judgment, however, made no change in the court's previous affirmance of paragraphs 4 and 6 of the Commission's order, the only portion of the decision which petitioners seek to review. The validity of those paragraphs was finally upheld in the court's original judgment of March 6, 1974, and the subsequent judgment made no change in that determination. Accordingly, the time for filing a petition for a writ of certiorari ran from the date of that first judgment. *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 212-213. The petition is therefore untimely.

2. In any event, this case presents no issue warranting further review. Petitioners do not challenge the Commission's holding that the advertisements violate Section 5 of the Federal Trade Commission Act, but take issue only with paragraphs 4 and 6 of the order. The

Commission, however, has wide discretion in determining what remedy is necessary to eliminate unfair or deceptive trade practices, and "the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist." *Jacob Siegel Co.* v. *Federal Trade Commission* 327 U.S. 608, 611-613.[3] The court of appeals correctly upheld paragraphs 4 and 6 as clear and closely related to the unlawful practices found.

Petitioners contend (Pet. 9-11) that the term "competent scientific test" in paragraph 4 is vague and that the Commission erred in failing to provide an objective standard for scientific testing. They argue that advertisers rely upon testing laboratories to evaluate the competency of their own tests, and that it is inappropriate, without promulgating an objective standard, to hold the advertisers liable for the competency of these tests.[4] Petitioners' violations, however, were not in misrespresenting as "scientific" tests that were not of that character, but in making particular claims that the scientifc tests did not support. To comply with the order, petitioners need only limit their claims to those that the scientific tests sustain.[5]

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[3]See also: *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473-476; *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 392-395; and *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 428-431.

[4]The Commission's requirement that product performance claims be supported by "competent scientific tests" was previously upheld in *The Firestone Tire and Rubber Company* v. *Federal Trade Commission*, 481 F. 2d 246 (C.A. 6), certiorari denied, 414 U.S. 1112, affirming 81 F.T.C. 398.

[5]Petitioners also argue (Pet. 11) that because the Commission found that the laboratories used by petitioners were *bona fide* and independent and because the Administrative Law Judge found that the reports of these labor-

Finally, petitioners argue (Pet. 12-13) that the requirement of paragraph 6 that each salesman of VX-6 be served with a copy of the order is unduly burdensome, because such distributors will in time receive new literature which complies with the order. As the court of appeals noted, however (Pet. App. A6):

> [D]istributors may have a supply of old materials and may not confine themselves to the written word. Since the copies of the order can be delivered along with the revised advertising material, the only burden on [petitioners] is of using certified mail so as to obtain a receipt. To impose this requirement is well within the broad power confided to the FTC in framing remedial orders.

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atories were in the standard form for commercial laboratories, "the imposition of paragraph 4, is unrelated to any violation of law committed by petitioners." The Commission found, however, that the advertisements mislead the public by giving the impression that each of the claims relating to product efficacy had been fully tested by independent laboratories when in fact the tests did not extend to some of the claims (C.A. App. 116a-117a). Requiring petititoners to support claims by a "competent scientific test" is therefore reasonably related to the unlawful practices involved.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General.

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OCTOBER 1974.

APPENDIX

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES COURTHOUSE

FOLEY SQUARE

NEW YORK 10007

DANIEL FUSARO

CLERK. Phone 264-6471

March 6, 1974

NATIONAL DYNAMICS CORP. etc. ET AL.

vs.

FEDERAL TRADE COMMISSION

Cal. No. 355

Dear Sirs:

The Court has today handed down a decision in the above entitled cause denying petition in part, and remanding cause in part.

A copy of the opinion will be mailed to you tomorrow.

Additional copies of opinions may be obtained from this office in accordance with § 0.17(7) of the rules of this Court supplementing the Federal Rules of Appellate Procedure.

Judgment has been entered today and mandate will issue in accordance with Rule 41 of the Federal Rules of Appellate Procedure.

Your attention is directed to the provision of Rule 39 (c) F.R.A.P. requiring the itemized and verified bill of costs, if any, to be filed within 14 days after entry of judgment, with proof of service.

Very truly yours,

A. DANIEL FUSARO

Clerk